

US v HUNTER -- SENTENCING

1

1 THE CLERK: All rise. You may be seated. Criminal
2 action 2015-20A. United States vs. Damon Hunter. Sentencing.
3 Counsel, please state your name and the party you represent
4 for the record.

5 MR. XIANG: Good afternoon, Your Honor. Wei Xiang
6 for the government.

7 MR. DAVIS: Good afternoon, Your Honor. Sam Davis on
8 behalf of Mr. Hunter.

9 THE COURT: Good afternoon. Sorry we're running a
10 little late, but you're not going anywhere anyway. You look
11 out the window, it looks like we're having a little snow. Are
12 we ready?

13 MR. XIANG: Yes, sir.

14 THE COURT: The defendant, Damon Hunter, stands
15 before the Court for sentencing on his previous plea of guilty
16 to one count of false declaration before a Grand Jury in
17 violation of Title 18 United States Code 1623(e). I know,
18 Counselor, you reviewed the reports. Mr. Davis, I assume you
19 reviewed it with your client?

20 MR. DAVIS: Yes, Your Honor.

21 THE COURT: The Court hereby accepts the terms and
22 conditions of the plea agreement and the plea of guilty. I
23 will now place the report in the record under seal. If an
24 appeal is filed, counsel on appeal will be permitted access to
25 the sealed report, except that counsel on appeal will not be

1 permitted access to the recommendation section.

2 The parties have filed the appropriate statement of
3 parties with respect to sentencing factors. There's no
4 dispute about the facts of the report and therefore, the Court
5 adopts those facts as this findings of fact and hereby
6 incorporates them in the record. There are no objections to
7 the probation officer's conclusions as to the applicable
8 guidelines.

9 The Court recommends that the defendant's base
10 offense level under guideline section 2X3.1(a)(3)(A) is 30.
11 Report recommends a three-level down adjustment based upon the
12 acceptance of responsibility and accordingly recommends the
13 offense level of 27 with a criminal history category of 5 as a
14 result of the defendant's prior record.

15 Under this calculation, the advisory range is 120 to
16 150 months. The Court notes that the plea agreement
17 anticipated that the defendant's criminal history category
18 would be 4. Under this calculation, the advisory range would
19 have been 100 to 125 months. However, it's ultimately
20 immaterial whether the defendant's criminal history category
21 is 4 or 5 because the statutory maximum in terms of
22 imprisonment is five years or 60 months, which is less than
23 the minimum of the guideline range in either criminal history
24 category. Therefore, the guideline range is 60 months.

25 The advisory range for supervised release is one to

1 three years. The fine range is 25,000 to \$250,000, plus the
2 cost of imprisonment and supervised release. In accordance
3 with the Supreme Court decision *U.S. v. Booker*, the 2nd
4 Circuit decision *U.S. v. Crosby*, the Court must consider the
5 guidelines, is not bound by them. The Court must also
6 consider the factors in 18 U.S.C. 3535(a). Now, I have
7 reviewed all the submissions by the parties. Mr. Davis?

8 MR. DAVIS: Your Honor, I am largely going to stand
9 on my submissions to the Court, but I would like briefly just
10 to speak to my client's situation, Your Honor, specifically,
11 the chain of events which brings him before you today, Judge.
12 Suffice to say that the situation my client found himself in
13 was quite graphic, quite troublesome, Judge. My client
14 witnessed a close friend of his being murdered, Judge. He saw
15 that this didn't happen in a vacuum. This isn't something
16 that he saw in a movie, that he heard about in passing. He
17 actually was there and he saw this, Judge.

18 And it's my understanding that the gentleman who he
19 saw do this, Judge, has a reputation. For all intents and
20 purposes, he's known as a contract killer, Judge, not with all
21 the glitz and glamor of Hollywood, but, nevertheless, the same
22 result in several instances. People in the community who were
23 killed by this gentleman, my client was privy to that. And if
24 he didn't believe those rumors, he had firsthand demonstration
25 of what this man was willing to do. So, that was in my

1 client's mind when he first came in contact with police.

2 This gentleman also fired upon my client and tried to
3 take his life, Judge. My client had to roll under a running
4 vehicle in an attempt to save his own life. So, when he went
5 to police officers, his mindset -- I can't imagine what he was
6 thinking at that moment in time, Judge. I rejoice when I make
7 it across the street safely when jaywalking. He dodged
8 several shots after seeing his friend killed in front of him.
9 So, he went to the police officers and he told them what he
10 thought he needed to tell them to save his life.

11 Now, Judge, my client represented to me that he was
12 told that he would be able to do this in a vacuum, that it
13 would not come back to bite him, that he would not have to
14 stand before people from the community and this gentleman and
15 regurgitate what happened in front of an open courtroom,
16 because he believed that that would lead to his detriment as
17 well as the one's he loved, Judge. Nevertheless, a sting was
18 developed. He was actually placed in that situation where he
19 was asked to recite what had happened.

20 Now, as the Court knows, during this time, my client
21 was in State custody. And as the Court, I'm sure, is aware,
22 there is a great level of communication between people in
23 prison and people on the street. The individual who he
24 witnessed commit this crime, Judge, has a network of people
25 who actually had contact with my client. And Mr. Wei was

1 prepared to present as evidence a letter which demonstrated
2 that there was an actual conversation, a quasi-tribunal taking
3 place within prison walls where my client's fate was being
4 decided, because it had gotten out in realtime that, in fact,
5 he had spoken with police officers and that the government
6 sought to use him as a witness.

7 Around that time, my client's relatives were being
8 approached on the street by people who had weapons and threats
9 were made; very real threats. My client found himself in a
10 situation, Judge, where he felt as though the lives of others
11 would be at stake and this caused him to break the law in that
12 he recanted his earlier statements, Judge. And that's what
13 brings us here today, Your Honor.

14 He wasn't predisposed to being a witness, Judge. He
15 wasn't -- he's not a violent man. If you look at his history,
16 it's not replete with incidents of violence.

17 THE COURT: Well, he was convicted of robbery and
18 possession of a weapon.

19 MR. DAVIS: Well, the possession of a weapon charge.

20 THE COURT: Yeah, but it was robbery of first degree,
21 Class B felony.

22 MR. DAVIS: Understood, Judge.

23 THE COURT: It's amazing he went from a first-degree
24 robbery, which is a Class B felony and apparently guilty, to a
25 disorderly conduct.

US v HUNTER -- SENTENCING

6

1 MR. DAVIS: Right, Judge. And I think that speaks
2 to --

3 THE COURT: I don't understand the facts of that one
4 at all. That's amazing that someone could be charged with a
5 Class B felony and then pleaded someone to a disorderly
6 conduct, but that didn't even count in the criminal history
7 category. It was zero points for that.

8 MR. DAVIS: Understood, Judge. I'm speaking to the
9 weapons charge, which he's currently incarcerated on. And
10 that charge happened -- that incident happened after he
11 witnessed this killing. He felt the need to be around a
12 weapon because he knew that this gentleman wanted him dead.
13 That was a very real threat for him, Judge. I know in this
14 courtroom and in the lives we lead, it might be hard for us to
15 comprehend that there is a person who wants to kill you, a
16 group of people who actually want to kill you and who have the
17 ability to do so, but that's the situation my client found
18 himself in.

19 Being unemployed, not being a person with vast
20 resources where he could leave, he didn't have those options.
21 He already had gone to the police. He sat in the police
22 station surrounded by police officers and told them what he
23 knew, only to have that information come back to him, repeated
24 accurately and then to be threatened because of what he had
25 told officers. That's the situation my client found himself

US v HUNTER -- SENTENCING

7

1 in when he decided to say that he was mistaken about the
2 gentleman that he identified.

3 My client is still in the State custody, Judge.
4 That's his reality, Your Honor. He's repentant for what he
5 did. He realizes that he violated the law. He never wanted
6 to be in the situation. He wasn't responsible for the events
7 which triggered his friend being killed.

8 And Judge, I just ask the Court to impose the minimum
9 sentence possible and to afford him the opportunity to serve
10 whatever sentence the Court imposes concurrently, Judge. He's
11 already had his pound of flesh taken for this. He's already
12 suffered for this chain of events.

13 The weapons charge, which he's currently serving
14 State time, is a direct result of this event. He stands here
15 before you today because of this event. He's lost his friend
16 because of this event. His family is less safe because of
17 this event. He's less safe because of this event. We would
18 ask the Court to take all that into account and sentence him
19 accordingly, Your Honor.

20 THE COURT: All right. Sir, this is your opportunity
21 to say anything you'd like to say.

22 THE DEFENDANT: Yeah. Well, I just want to apologize
23 to wasting everybody's time. It's obvious that if I were to
24 just told the Grand Jury about what happened on that day, I
25 wouldn't be here. But just when these dudes killed my

1 brother, I was just like -- and that he was questioned about
2 what I was telling them, that just was, like, enough for me to
3 just, like, say no. I backed out. I backed out at the last
4 moment. And now, it's like, the safety and security of my
5 family is involved. It was a hard decision for me, but I just
6 backed out at the last moment and I know I can't take it back.
7 What's done is done. I have got to face the music. So, you
8 know, that's basically it, Judge.

9 MR. XIANG: Your Honor, the government is not
10 unsympathetic to Mr. Hunter's situation and I wouldn't dispute
11 almost any of the facts or the proffer that counsel has made
12 except for that the firearm conviction he has now was
13 somewhere related to his fear of the defendant. I don't know
14 about that, but there's no indication that I have of that.

15 But there are two concerns that the government
16 believes is important with respect to the 3553 factors,
17 sentencing factors, about affording adequate deterrence to
18 criminal conduct, as in general deterrence for this type of
19 crime, because Mr. Hunter is not the only person who has ever
20 found himself in this situation and he's not going to be the
21 only one who ever will. This is not unique to the kinds of
22 cases that we'll have, the narcotics, racketeering, the gang
23 violence cases that are coming out of the West and East Sides
24 of Buffalo at least every year.

25 The first is, respect for the authority of the Grand

1 Jury subpoena. There was, as according to the plea agreement
2 and as adopted in the presentence report, one of Mr. Hunter's
3 concerns was that he wasn't going to get credit on his State
4 gun case for testifying before the Federal Grand Jury. And,
5 frankly, Judge, that he was under a Grand Jury subpoena. He
6 was a civilian witness, an eyewitness to a crime. It's not
7 like he was a participant who might have some sort of Fifth
8 Amendment concerns or might need something, some benefit, some
9 promises in order to come in and talk about what he was a part
10 of.

11 He was a witness, a victim, just like anybody out on
12 the street would have been. And if people out on the street
13 who have no criminal histories, no criminal contacts get a
14 Grand Jury subpoena, they have to come in and they have to
15 testify.

16 Mr. Hunter was in no different position, even though
17 he had a -- he was in jail and he had a pending case. They
18 were unrelated and he should not and the government would not
19 have -- we weren't going to give him any credit for simply
20 coming in because that's what -- he was under a Grand Jury
21 subpoena and he needed to comply with it.

22 Now, if he didn't want to comply with it, he had an
23 option. He could have still respected the need to tell the
24 truth by simply saying, I don't want to testify. He could
25 have come before Your Honor on either a civil contempt or some

US v HUNTER -- SENTENCING

10

1 other recourse and the Court would have simply have to decide
2 whether or not what sanctions to impose, what recourse to take
3 with respect to whether or not Mr. Hunter was going to be
4 forced to comply with the subpoena.

5 THE COURT: Did he have an attorney with him at the
6 time?

7 MR. XIANG: He did have an attorney for one proffer.
8 He was represented.

9 THE COURT: At the time of the Grand Jury?

10 MR. XIANG: I'm sorry?

11 THE COURT: At the time of the Grand Jury proceeding?

12 MR. XIANG: At the time of the Grand Jury, he had an
13 attorney on the State case, but not assigned as to the Grand
14 Jury matter because --

15 THE COURT: Federal Grand Jury.

16 MR. XIANG: That's correct, Your Honor. Because he
17 was not -- there was no privilege for him to invoke in terms
18 of self-incrimination. And we never got to the point. If he
19 had refused to comply with the subpoena, then we may have come
20 before the Court and he would have had a counsel appointed for
21 that.

22 As noted, we even had to apply reasonable force order
23 to bring him out of jail to come to the Grand Jury because he
24 had refused to comply once. So, there was certainly -- he
25 knew that there were options to not simply coming to the Grand

1 Jury and lying. And you know, other people did come. The
2 person he speaks of is, the Court may be aware, is indicted
3 for murder in aid of racketeering, racketeering conspiracy,
4 and other charges and a pending indictment here is still
5 before Judge Scott on pretrial motions.

6 But he was indicted. There were other witnesses who,
7 you know, risked the same harm to their livelihood, to their
8 families to come in to testify to either comply with subpoenas
9 or other means to obtain their testimony for the Grand Jury.
10 They testified at the Grand Jury and they are expected and
11 they will testify at trial, if there is one.

12 So -- and what Mr. Hunter did is now create a
13 *Giglio/Brady* material that is going to last through the
14 entirety of the case. It may not have affected the fact that
15 there was an indictment, but now this recantation that is
16 going to linger over the entire case, regardless of whether or
17 not he testifies in the future, because it would impeach any
18 other witness who testifies differently to the truth.

19 So, there was a lot of trouble that was created
20 because of this decision by Mr. Hunter. And you know, I don't
21 necessarily believe that a fully consecutive sentence, five
22 years stacked on top of the seven years that he's already
23 doing, is necessarily the most appropriate, but I do think
24 that there is a need for the Court to recognize that there are
25 consequences to him and there ought to be enough to provide

1 general deterrence to every other prospective witness who
2 might be coming in. Because after all, it's the witnesses,
3 the testifying witnesses and the expectation, the oath they
4 take to testify to the truth that really is the backbone of
5 every single case of the criminal justice system, you know,
6 DNA, exhibits, physical exhibits.

7 They are great and all, but chain of custody,
8 relevance, all of those things depend on someone getting up
9 here under penalty of perjury, swearing that what there saying
10 is true, accurate. And that is what people are indicted on
11 the basis of and that is what defendants are convicted on the
12 basis of. So, in order to sentence -- you know, it would be
13 up to -- in the Court's wisdom to decide what is the sentence
14 that is appropriate in order to advance those interests.

15 THE COURT: What are you recommending? Are you
16 opposed to the concurrent sentence?

17 MR. XIANG: It is a difficult case for us. I don't
18 think a fully consecutive sentence is appropriate. I don't
19 think a fully concurrent sentence is appropriate because then,
20 really, it's as if nothing happened. In the future, he might
21 be a criminal history category 6, but it really doesn't --

22 THE COURT: How would you justify a non-guideline
23 sentence here? What would you say -- you are apparently, as I
24 understand what you're saying, is that a sentence of
25 incarceration is appropriate here, Judge, maybe not the

1 guideline range, but maybe some other range, but it should be
2 run consecutive so there is some form of punishment for lying
3 before a Grand Jury because the Grand Jury is such an
4 important part of our criminal justice system. There's no
5 question about it that it is. It's critical that people
6 testify honestly and truthfully in order for our system to
7 even work. And people to come in and commit perjury, the
8 system itself will suffer greatly as a result of that. So,
9 what are you suggesting?

10 MR. XIANG: Judge, the guideline sentence of
11 60 months is -- well, one, the plea agreement binds both
12 parties that that's what we're asking the Court. It's whether
13 to run it partially concurrent or fully concurrent.

14 THE COURT: What's partially concurrent? I don't
15 know what that means.

16 MR. XIANG: The --

17 THE COURT: Partially concurrent? What do you do?

18 MR. XIANG: That's is what the guidelines --

19 THE COURT: Partially concurrent.

20 MR. XIANG: To provide for that it's -- could be run
21 partially concurrent, if the Court were --

22 THE COURT: Partially concurrent?

23 MR. XIANG: Partially concurrent, partially
24 consecutive would be what --

25 THE COURT: How would you frame a sentence?

1 MR. XIANG: That would be difficult.

2 THE COURT: That's up to me.

3 MR. XIANG: Starting at a particular time and then
4 lasting until the end.

5 THE COURT: Why don't you come on back here at 1:30?
6 Let me think about this.

7 MR. DAVIS: Judge, there were just a couple of things
8 that I want to address in what counsel said, if possibly.

9 THE COURT: Go ahead.

10 MR. DAVIS: Judge, with regard it my client wanting
11 credit for his testimony, the credit which he sought -- bear
12 in mind, my client has a 10th grade education, Judge.

13 THE COURT: Is what?

14 MR. DAVIS: He has a 10th grade education. So, he
15 isn't as learned as counsel and able to make legal strategic
16 decisions, if you will, as to how to avoid testifying. But
17 nevertheless, Judge, when he sought credit, the credit he
18 sought was to not have to go to jail with the very people that
19 he was about to testify against because he feared reprisal.

20 And he wanted to be able to actually leave the area.
21 I think that he finds himself in a little bit of a different
22 situation than the average person who testified. Who's
23 helping him testify, I don't know who these people are. My
24 client was one actually -- he actually grew up around this
25 gentleman. So, this gentleman knew his habits. He knew where

1 his family lived. He had a great deal of information about my
2 client and his family. And this gentleman, once again --

3 THE COURT: Yeah, but this happens all the time in
4 this world that unfortunately we live in. I mean, people that
5 are involved and testifying and involved around and maybe
6 sometimes part of the criminal justice system are always
7 subject to this kind of -- you might say fear or a better word
8 probably would be harm that might come to them. It happens in
9 the prisons.

10 MR. DAVIS: This is true.

11 THE COURT: It's a big problem in the United States
12 right now is individuals who have cooperated with the
13 government getting access by other inmates through the 5Ks, or
14 whatever, whether the person cooperated. Okay. I understand
15 that. How long is he -- what is the state sentence? I can't
16 find that in the pretrial --

17 MR. XIANG: It's a seven-year sentence, Your Honor.
18 He's been in since early this year. I think he's due for
19 parole -- he's eligible for parole in 2019.

20 MR. DAVIS: Yes. And that's --

21 THE COURT: Where is that? Is that in the report
22 somewhere?

23 MR. XIANG: It's paragraph 46 on page 16. He's
24 eligible for parole on October 10th, 2019.

25 MR. DAVIS: And, Judge, I would like to also point

1 out that this case here had to be answered for when he appears
2 before the parole board. It's not like if he receives a
3 concurrent sentence that he will not necessarily not feel the
4 effect of that, because in 2019, he'll have to sit before a
5 board with individuals who may decide that he should, in fact,
6 spend --

7 THE COURT: Where did you come up with the 7/19 -- or
8 2019?

9 MR. DAVIS: That's when he's eligible for parole.

10 THE COURT: Where did you see that?

11 MR. DAVIS: My client represented that to me himself.

12 THE COURT: Is that in the report somewhere?

13 MR. DAVIS: I believe so, Judge. I don't have --

14 MR. XIANG: Judge, it's paragraph 46 on page 60.

15 THE COURT: It says the sentence of seven years
16 imprisonment.

17 MR. XIANG: Judge, the bottom line.

18 THE COURT: I don't understand this at all. I'm
19 totally confused as to when he is eligible for parole.

20 P.O. PISKORZ: Your Honor, at paragraph 46 of the PSI
21 in the written narrative below the criminal history entry,
22 it's the last sentence. It says the defendant is eligible for
23 parole on October 10, 2019.

24 THE COURT: Oh, okay. All right. Well, thank you.
25 I want to think about this for a second. Come on back here

1 about 1:15.

2 MR. DAVIS: Yes, Your Honor.

3 (Brief recess).

4 THE CLERK: All rise. You may be seated.

5 THE COURT: All right. Are we ready, Mr. Davis?

6 MR. DAVIS: Yes, Your Honor.

7 THE COURT: Anything further?

8 MR. XIANG: No, Your Honor.

9 MR. DAVIS: No, Judge.

10 THE COURT: Pursuant to the Sentencing Reform Act of
11 1984, judgment of the Court that the defendant, Damon Hunter,
12 is hereby committed to the custody of the Bureau of Prisons to
13 be imprisoned for a period of 60 months.

14 Pursuant to Guideline Section 5G1.3(d), application
15 note 4, the sentence shall run partially concurrent in the
16 following manner: 48 months of the defendant's sentence in
17 this case shall run concurrent to the defendant's undischarged
18 State sentence of seven years imprisonment imposed in Erie
19 County Court on December 9th, 2014 under docket number
20 2013-1883. The remaining 12 months of the defendant's
21 sentence in this case shall run consecutive to the currently
22 undischarged state sentence.

23 Cost of incarceration fee is waived. He shall be
24 placed on supervised release for two years. He shall report
25 to the probation office in the district in which he is

1 released within 72 hours of release; shall comply with the
2 standard conditions of supervised release adopted by the
3 Court; shall not commit another federal, state or local crime;
4 shall be prohibited from possessing a firearm or other
5 dangerous device and shall not possess a controlled substance.

6 Drug testing is required. He shall submit to
7 substance abuse testing to include urinalysis or other
8 testing. Details of such testing to be approved by the
9 probation office. If substance abuse is indicated by testing,
10 he is to complete drug and alcohol evaluation and enter into
11 any treatment as deemed necessary by the probation office. He
12 is not to leave treatment until discharge is agreed to by the
13 probation office.

14 While in treatment and after discharge from
15 treatment, he is to abstain from the use of alcohol, be
16 required to contribute to the cost of services rendered in an
17 amount to be determined by the probation office based on the
18 ability to pay or availability of third-party payment.

19 He shall participate in vocational and/or educational
20 programming approved by the U.S. Probation Office. He shall
21 obtain his General Education Diploma; shall submit to a search
22 of his person, property, vehicle, place of residence or any
23 other property under his control based upon reasonable
24 suspicion and permit the confiscation of any evidence or
25 contraband discovered. The Court finds he does not have the

1 ability to pay a fine, however, I will order the mandatory
2 special assessment of \$100 which is due immediately. Payment
3 shall begin under the Bureau of Prisons Inmate Financial
4 Responsibility Program.

5 In determining the sentence, the Court has considered
6 the advisory range and points raised by counsel and by the
7 defendant. In addition, the Court has considered the factors
8 set forth in 3553(a) and finds the sentence imposed is
9 sufficient but not greater than necessary to comply with the
10 purpose of sentencing set forth in 18 U.S.C. 3553(a).

11 I have imposed a sentence within the guideline range.
12 Basically what it is, is four years is going to be concurrent
13 with the State, one year consecutive, which I believe under
14 all the circumstances and for the reasons set forth in
15 Mr. Davis's argument, there are a lot of extenuating
16 circumstances. I was kind of inclined to make it straight
17 five years incarceration, but I understood all the factors
18 here. They're somewhat unusual, not totally, but I figure
19 under all the circumstances, one year of incarceration is a
20 fair and reasonable sentence.

21 You have a right to -- and I think the government
22 pretty much agreed that a five-year sentence of imprisonment
23 would have been, under all the circumstances, a little bit
24 longer than may be necessary.

25 MR. XIANG: Yes, Your Honor.

1 THE COURT: You have a right to appeal the sentence,
2 if you feel the Court misapprehended its authority or imposed
3 an illegal sentence, however, you did waive your right to
4 appeal. If you feel that waiver is not a valid waiver, you
5 may take that issue before the 2nd Circuit Court of Appeals.
6 Anything further?

7 MR. DAVIS: No, Your Honor. Thank you.

8 MR. XIANG: The government moves to dismiss Count 2
9 of the indictment.

10 THE COURT: Motion is granted.

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

* * * * *

I certify that the foregoing is a
correct transcription of the proceedings
recorded by me in this matter.

s/ Megan E. Pelka, RPR

Court Reporter,